

No. 75-679

Supreme Court, U. S.

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**In the Supreme Court of the United States**

OCTOBER TERM, 1976

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**INTERNAL REVENUE SERVICE, PETITIONER**

*v.*

**FRUEHAUF CORPORATION, ET AL.**

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**ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SIXTH CIRCUIT**

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**MOTION TO VACATE AND REMAND  
TO THE COURT OF APPEALS**

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Pursuant to Rule 35, the Solicitor General, on behalf of the Internal Revenue Service, moves to vacate the judgment of the court of appeals and to remand the case to that court to consider the effect of legislation enacted after the grant of certiorari.

This case arises under the Freedom of Information Act, as amended, 5 U.S.C. 552. Exemption 3 of that Act, 5 U.S.C. 552(b)(3), bars disclosure of "matters that are \* \* \* specifically exempted from



disclosure by statute." The question upon which certiorari was granted is whether this exemption covers Internal Revenue Service technical advice memoranda, letter rulings, and other related files because of the prohibition against public inspection of tax returns provided by 26 U.S.C. 6103, where such documents contain information which is either part of or related to returns filed by particular taxpayers.

1. Respondent Fruehauf Corporation manufactures trucks and their parts and accessories. It and two of its officers were charged in an indictment in the United States District Court for the Eastern District of Michigan with: (1) conspiring to defeat the assessment of the federal manufacturer's excise tax imposed by Section 4061 of the Internal Revenue Code of 1954 (26 U.S.C.); (2) attempting to evade excise taxes of \$12,344,587, in violation of 26 U.S.C. 7201; and (3) aiding in the preparation of materially false and fraudulent excise tax returns, in violation of 26 U.S.C. 7206(2). During pretrial discovery proceedings, respondents sought to obtain from the government documents (in the possession of the Internal Revenue Service) which they claimed would supply information essential to their defense. The government contended that such materials were not subject to discovery<sup>1</sup> (Pet. App. A 1A-2A).

<sup>1</sup> After a nonjury trial, respondents were found guilty in July, 1975. William E. Grace, President and Chief Executive Officer, and Robert D. Rowan, Vice President and Comptroller, were sentenced to six months in prison and two years

Respondents thereupon brought this suit in the United States District Court for the Eastern District of Michigan under the Freedom of Information Act (FOI Act), 5 U.S.C. 552. They sought copies of documents prepared by the Internal Revenue Service from January 1, 1947 to September 13, 1973, in connection with its determinations whether particular vehicles were subject to the manufacturer's excise tax, and its computation of the sales price of such vehicles under Section 4216 of the Code. Specifically, respondents sought (Pet. App. A 2A-3A; A. 9-14, 48-49):

(1) all "unpublished private rulings and/or letter rulings" issued by the Excise Tax Branch, Internal Revenue Service since January 1, 1947 to manufacturers of automobile and truck chassis and bodies, involving any of a number of specified determinations with respect to price, constructive price, and coverage under Sections 4216, 4061, and 6416 of the Code;

(2) Internal Revenue Service files, including correspondence, analysis and submissions of fact applicable to 23 published Revenue Rulings;

(3) communications received by the Internal Revenue Service from persons outside the executive branch of the government with respect to the requested private letter rulings;

(4) so much of the Internal Revenue Service's letter ruling indexing system as would enable

of unsupervised probation, and each fined \$10,000. Respondent Fruehauf Corporation was also fined \$10,000. Respondents have appealed their convictions to the court of appeals (C.A. 6, No. 76-2313).

respondents to determine whether additional similar letter rulings have been issued by the Service.

The Internal Revenue Service moved for summary judgment on the ground that the requested documents were exempt from disclosure under exemption 3 of the FOI Act, 5 U.S.C. 552(b)(3), as "matters that are \* \* \* specifically exempted from disclosure by statute." In support of this motion, the Service relied upon Section 6103 of the Internal Revenue Code of 1954, which then provided that tax returns shall be open to public examination only to the extent authorized in rules and regulations promulgated by the President (A. 33).

2. The district court rejected the claim that the materials were specifically exempt from disclosure by statute. In its view, Section 6103 of the Internal Revenue Code was inapplicable to the documents at issue relating to excise tax returns because "[it] provides for the protection of the privacy of persons filing *Income Tax Returns*" (Pet. App. A 5A; emphasis in original). The district court thereafter entered an order denying the Internal Revenue Service's motion for summary judgment and enjoining it from withholding the records requested by respondents (Pet. App. A 7A-12A). The court ordered that the Service make available the records and documents "intact and without deletion, except for those items which \* \* \* [it] submits to the Court \* \* \* sealed and intact, without deletion but with any proposed deletions indicated, for in camera review by the

Court \* \* \* as to whether the proposed deletions are justified under the Freedom of Information Act \* \* \* (Pet. App. A 8A).

The court of appeals affirmed (Pet. App. B 13A-28A). Although it concluded that the district court erred in construing Section 6103 to bar public inspection of only income tax returns, it held that disclosure of the letter rulings was appropriate because they were not "returns" within the meaning of Section 6103 and therefore did not come within exemption 3 of the FOI Act. While the court acknowledged that certain letter rulings might fall within the definition of "return" under the Presidential regulations promulgated under Section 6103, it concluded, in conformity with *Tax Analysts & Advocates v. Internal Revenue Service*, 505 F.2d 350 (C.A.D.C.), that those Regulations could not "immunize letter rulings from disclosure under the Freedom of Information Act, beyond that which Congress intended to protect under § 6103. 505 F.2d at 354, n. 1" (Pet. App. B 20A).

In deciding that the technical advice memoranda sought by respondents did not come within exemption 3, the court of appeals declined to follow the contrary conclusion reached in *Tax Analysts & Advocates*, *supra*, 505 F.2d at 355. It considered the scope of the district court's disclosure order with respect to such documents to be more limited than the order in the *Tax Analysts* case. Finally, the court of appeals also observed that the retained power of the district court to make *in camera* deletions from the



technical advice memoranda would be sufficient to satisfy the prohibitions against disclosure of Section 6103 (Pet. App. B 20A-22A).

By order dated October 9, 1975, Mr. Justice Stewart stayed the judgment of the district court until final disposition of the case in this Court, in the event the government sought certiorari (423 U.S. 919). On January 12, 1976, the Court granted the government's petition for a writ of certiorari (423 U.S. 1047).

3. Since the Court's grant of certiorari and the filing of briefs in this case, the Tax Reform Act of 1976, Pub. L. 94-455, 90 Stat. 1520, was enacted into law on October 4, 1976. The new legislation radically changes the operative rules for the public inspection of the types of Internal Revenue Service documents that are the subject of respondents' FOI Act suit.

Section 1201(a) of that Act, 90 Stat. 1660, adds a new Section 6110 to the Internal Revenue Code of 1954, Appendix, *infra*, pp. 3a-8a. Section 6110(a) permits public inspection of "written determinations" and associated "background file documents." Section 6110(b)(1) defines a "written determination" as "a ruling, determination letter, or technical advice memorandum" issued by the Internal Revenue Service. Section 6110(b)(2) defines the term "background file document" with respect to a written determination to include "the request for that written determination [and] any written material submitted in support of the request, and any communication

(written or otherwise) between the Internal Revenue Service and persons outside the Internal Revenue Service in connection with such written determination \* \* \* received before issuance of the written determination." Moreover, Section 6110(c)(1) exempts from disclosure the names, addresses, and other identifying details of the taxpayers who are subjects of Internal Revenue Service written determinations and background file documents.

In prescribing procedures for disclosure of written determinations, the Act distinguishes between written determinations issued pursuant to taxpayer requests made before and after October 31, 1976. While written determinations issued pursuant to a taxpayer request made after that date will be subject to disclosure within a prescribed period of time, disclosure of written determinations issued pursuant to taxpayer requests made on or before that date is contingent upon a subsequent appropriation of funds to the Internal Revenue Service. See Section 6110(g) and (h)(1), Appendix, *infra*, pp. 5a-8a. However, Section 1201(b) of the Tax Reform Act, 90 Stat. 1667, provides that the appropriation of funds contingency is inapplicable to FOI Act suits, such as the instant case, that were commenced before January 1, 1976. Instead, written determinations sought in such suits "shall be available to the complainant along with the background file document, if requested, as soon as practicable after July 1, 1976." See Appendix, *infra*, p. 8a.

Finally, Section 1202 of the Tax Reform Act of 1976, 90 Stat. 1667, amends Section 6103 of the Code, relating to publication of tax returns and disclosure of information concerning persons filing tax returns. Although Section 6103(a) provides that "Returns and return information shall be confidential," Section 6103(b)(2)(B) excludes from the definition of "return information" those parts of written determinations and background file documents that are subject to public inspection under Section 6110.

4. In light of the new legislation described above, the Internal Revenue Service can no longer argue that all of the documents sought by respondents are "matters that are \* \* \* specifically exempted from disclosure by statute" under exemption 3 of the FOI Act. The letter rulings and technical advice memoranda at issue in this suit are "written determinations" within the meaning of Section 6110(b)(1) of the Code. Some of the second and third categories of documents sought by respondents—the Internal Revenue Service files applicable to 23 published revenue rulings, and the communications received by the Internal Revenue Service from persons outside the executive branch with respect to the requested private letter rulings—are "background file documents" as defined by Section 6110(b)(2). However, it does not appear that any part of the Internal Revenue Service's letter ruling indexing system is either a "written determination" or a "background file document" that would be subject to disclosure.

Since the enactment of the Tax Reform Act of 1976, counsel for the parties have held several meetings and exchanged correspondence in an effort to settle this suit. The Internal Revenue Service has acknowledged its statutory obligation to deliver to respondents copies of the letter rulings and technical advice memoranda, and communications between the Internal Revenue Service and persons outside the executive branch with respect to the requested letter rulings, with appropriate deletions of taxpayer identifying material. Internal Revenue Service personnel are now editing approximately 2,500 written determinations and 7,500 background file documents. It is expected that respondents will begin to receive them within six weeks, after appropriate notice to the affected taxpayers in the Federal Register.

However, the parties have not reached agreement about the Internal Revenue Service files covering 23 published revenue rulings and the Internal Revenue Service's letter rulings indexing system. To the extent that the Service's files contain internal memoranda prepared as part of its deliberative process in connection with the publication of revenue rulings, those documents appear to be intra-agency memoranda protected from disclosure by exemption 5 of the FOI Act, 5 U.S.C. 552(b)(5). Moreover, much of the material in the indexing systems arranged by the name of the taxpayer appears to be taxpayer identifying material that would have to be deleted before disclosure.



With respect to the subject matter indexing systems, the legislative history of the Tax Reform Act demonstrates that Congress anticipated that a new subject matter index would be issued by the Internal Revenue Service covering disclosed written determinations. However, the pertinent Committee Report stated that "it is not contemplated that existing IRS indices will be disclosed." S. Rep. No. 94-938, 94th Cong., 2d Sess. 306 (1976).

While respondents have advised us that they do not seek disclosure of all of the index cards, they have expressed the view that the legislative history of the Tax Reform Act of 1976 requires implementation of the district court's order (Pet. App. A 7A-12A) that the Internal Revenue Service turn over all of the documents encompassed in respondents' request. But the colloquies in the floor debates upon which respondents rely simply support the view that Congress intended that the liberalized disclosure rules of the Tax Reform Act would not foreclose any broader relief that a plaintiff might obtain in an FOI Act suit under the old law. It does not mean that the non-final order in this case cannot be modified to conform to the substantive changes effected by the Tax Reform Act of 1976. See 122 Cong. Rec. S16023 (remarks of Senators Long and Hansen) and H10235-H10236 (remarks of Representative Duncan) (daily ed., September 16, 1976).

At all events, to the extent that there is a remaining controversy between the parties, it is beyond dispute that the new legislation has substantially re-

solved the major public question of the disclosure of Internal Revenue Service letter rulings with respect to which this Court granted certiorari. There is accordingly no need for the Court to hear oral argument and to decide in the first instance the subsidiary questions in this case involving the revenue ruling files and indexing systems.

In these circumstances, the appropriate course would be for the Court to vacate the judgment of the court of appeals and remand the case to that court for consideration of whatever issues may remain unresolved in the light of the Tax Reform Act of 1976. *United States v. New Jersey State Lottery Comm'n*, 420 U.S. 371; *Bryan v. Austin*, 354 U.S. 933.

Respectfully submitted.

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JANUARY 1977.



## APPENDIX

Internal Revenue Code of 1954, as amended by the Tax Reform Act of 1976, Pub. L. 94-455, 90 Stat. 1520 *et seq.* (26 U.S.C.):

SEC. 6103. CONFIDENTIALITY AND DISCLOSURE OF RETURNS AND RETURN INFORMATION.

(a) *General Rule.*—Returns and return information shall be confidential, and except as authorized by this title—

(1) no officer or employee of the United States,

(2) no officer or employee of any State or of any local child support enforcement agency who has or had access to returns or return information under this section, and

(3) no other person (or officer or employee thereof) who has or had access to returns or return information under subsection (e)(1)(D)(iii) or subsection (n),

shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section. For purposes of this subsection, the term “officer or employee” includes a former officer or employee.

(b) *Definitions.*—For purposes of this section—

(1) *Return.*—The term “return” means any tax or information return, declaration of estimated tax, or claim for refund required by, or provided for or permitted under, the provisions

of this title which is filed with the Secretary by, on behalf of, or with respect to any person, and any amendment or supplement thereto, including supporting schedules, attachments, or lists which are supplemental to, or part of, the return so filed.

(2) *Return information.*—The term “return information” means—

(A) a taxpayer’s identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer’s return was, is being, or will be examined or subject to other investigation or processing, or any other data received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense, and

(B) any part of any written determination or any background file document relating to such written determination (as such terms are defined in section 6110(b)) which is not open to public inspection under section 6110,

but such term does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer.

\* \* \* \* \*

## SEC. 6110. PUBLIC INSPECTION OF WRITTEN DETERMINATIONS.

(a) *General Rule.*—Except as otherwise provided in this section, the text of any written determination and any background filed document relating to such written determination shall be open to public inspection at such place as the Secretary may by regulations prescribe.

(b) *Definitions.*—For purposes of this section—

(1) *Written determination.*—The term “written determination” means a ruling, determination letter, or technical advice memorandum.

(2) *Background file document.*—The term “background file document” with respect to a written determination includes the request for that written determination, any written material submitted in support of the request, and any communication (written or otherwise) between the Internal Revenue Service and persons outside the Internal Revenue Service in connection with such written determination (other than any communication between the Department of Justice and the Internal Revenue Service relating to a pending civil or criminal case or investigation) received before issuance of the written determination.

(3) *Reference and general written determinations.*—

(A) *Reference written determination.*—The term “reference written determination” means any written deter-

mination which has been determined by the Secretary to have significant reference value.

(B) *General written determination.*—The term “general written determination” means any written determination other than a reference written determination.

(c) *Exemptions From Disclosure.*—Before making any written determination or background file document open or available to public inspection under subsection (a), the Secretary shall delete—

(1) the names, addresses, and other identifying details of the person to whom the written determination pertains and of any other person, other than a person with respect to whom a notation is made under subsection (d)(1), identified in the written determination or any background file document;

(2) information specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy, and which is in fact properly classified pursuant to such Executive order;

(3) information specifically exempted from disclosure by any statute (other than this title) which is applicable to the Internal Revenue Service;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(6) information contained in or related to examination, operating, or condition reports prepared by, or on behalf of, or for use of an agency responsible for the regulation or supervision of financial institutions; and

(7) geological and geophysical information and data, including maps, concerning wells.

The Secretary shall determine the appropriate extent of such deletions and, except in the case of intentional or willful disregard of this subsection, shall not be required to make such deletions (nor be liable for failure to make deletions) unless the Secretary has agreed to such deletions or has been ordered by a court (in a proceeding under subsection (f)(3)) to make such deletions.

\* \* \* \* \*

(g) *TIME FOR DISCLOSURE.*—

(1) *IN GENERAL.*—Except as otherwise provided in this section, the text of any written determination or any background file document (as modified under subsection (c)) shall be open or available to public inspection—

(A) no earlier than 75 days, and no later than 90 days, after the notice provided in subsection (f)(1) is mailed, or, if later,

(B) within 30 days after the date on which a court decision under subsection (f)(3) becomes final.



(2) **POSTPONEMENT BY ORDER OF COURT.**—The court may extend the period referred to in paragraph (1)(B) for such time as the court finds necessary to allow the Secretary to comply with its decision.

(3) **POSTPONEMENT OF DISCLOSURE FOR UP TO 90 DAYS.**—At the written request of the person by whom or on whose behalf the request for the written determination was made, the period referred to in paragraph (1)(A) shall be extended (for not to exceed an additional 90 days) until the day which is 15 days after the date of the Secretary's determination that the transaction set forth in the written determination has been completed.

(4) **ADDITIONAL 180 DAYS.**—If—

(A) the transaction set forth in the written determination is not completed during the period set forth in paragraph (3), and

(B) the person by whom or on whose behalf the request for the written determination was made establishes to the satisfaction of the Secretary that good cause exists for additional delay in opening the written determination to public inspection,

the period referred to in paragraph (3) shall be further extended (for not to exceed an additional 180 days) until the day which is 15 days after the date of the Secretary's determination that the transaction set forth in the written determination has been completed.

(5) **SPECIAL RULES FOR CERTAIN WRITTEN DETERMINATIONS, ETC.**—Notwithstanding the provisions of paragraph (1), the Secretary shall not be required to make available to the public—

(A) any technical advice memorandum and any related background file document involving any matter which is the subject of a civil fraud or criminal investigation or jeopardy or termination assessment until after any action relating to such investigation or assessment is completed, or

(B) any general written determination and any related background file document that relates solely to approval of the Secretary of any adoption or change of—

(i) the funding method or plan year of a plan under section 412,

(ii) a taxpayer's annual accounting period under section 442,

(iii) a taxpayer's method of accounting under section 446(e), or

(iv) a partnership's or partner's taxable year under section 706,

but the Secretary shall make any such written determination and related background file document available upon the written request of any person after the date on which (except for this subparagraph) such determination would be open to public inspection.

(h) *Disclosure of Prior Written Determinations and Related Background File Documents*—

(1) *In general.*—Except as otherwise provided in this subsection, a written determination issued pursuant to a request made before November 1, 1976, and any background file document relating to such written determination shall be open or avail-

able to public inspection in accordance with this section.

(2) *Time for disclosure.*—In the case of any written determination or background file document which is to be made open or available to public inspection under paragraph (1)—

(A) subsection (g) shall not apply, but

(B) such written determination or background file document shall be made open or available to public inspection at the earliest practicable date after funds for that purpose have been appropriated and made available to the Internal Revenue Service.

. . . . .

Tax Reform Act of 1976, Pub. L. 94-455, Section 1201(b), 90 Stat. 1667:

*Effect Upon Pending Requests.*—Any written determination or background file document which is the subject of a judicial proceeding pursuant to section 552 of title 5, United States Code, commenced before January 1, 1976, shall not be treated as a written determination subject to subsection (h)(1), but shall be available to the complainant along with the background file document, if requested, as soon as practicable after July 1, 1976.